MCI Telecommunications Corporation

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ORIGINAL

EX PARTE OR LATE FILED

November 13, 1997

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MCI Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Act, CC Docket No. 96-149; and Ameritech Corporation v. MCI Telecommunications Corporation, File No. E-97-17

Dear Ms. Salas:

MCI Telecommunications Corporation (MCI) is filing the attached pleadings in response to the ex parte filing submitted in the above-referenced proceedings by Ameritech on September 5, 1997.[1] In the outline attached to the Ameritech ex parte, Ameritech reiterates its views on the restrictions imposed by Section 271(e)(1) of the Act on joint marketing by interexchange carriers (IXCs), while virtually conceding that MCI has not actually violated Section 271(e)(1). For example, the outline admits that "MCI ... insulat[es] itself from liability by avoiding explicit mention of [one-stop shopping and/or bundled packages]," while suggesting that such careful compliance with the law and Commission rules is somehow underhanded. In some cases, the assertions in the outline are rebutted by the material attached to the outline itself (e.g., the MCI Internet page, characterized by Ameritech as a "blatant" violation, is plainly targeted to "business" customers -- who are furnished local service via MCI's own facilities -- and states: "Cross-volume discounts not available where MCI furnishes local services utilizing resold facilities."

Other charges in the outline have already been thoroughly discredited in MCI's Reply Comments in support of the above-referenced Petition for Declaratory Ruling in CC Docket No. 96-149. For example, MCI has explained that the Non-Accounting

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[1] Letter from Gary L. Phillips, Ameritech, to William F. Caton, Acting Secretary, FCC, dated Sept. 5, 1997, with attachments.

Safeguards Order[2] permits IXCs to advertise joint "post-sale" customer care.[3] MCI has also explained, in the attached pleadings in the above-referenced complaint proceeding brought by Ameritech, that the joint advertising by an IXC of bundled facilities-based local service and long distance service does not become illegal after-the-fact if the IXC later starts to offer resold local service to some of the customers targeted by the advertising. If Ameritech's retroactive contamination theory were accepted, no IXC could ever jointly market facilities-based local and long distance services, since it could never be absolutely certain that it would never offer resold local service to some of the same customers at some later time.[4]

Accordingly, Ameritech's attempt in the outline to micromanage MCI's marketing efforts should be rejected. MCI has complied with and continues to comply with the requirements of Section 271(e)(1) and the Non-Accounting Safeguards Order. The Commission should issue a declaration that the advertising materials attached to MCI's Petition comply with those requirements and dismiss Ameritech's complaint.

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[2] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996)(Non-Accounting Safeguards Order), petitions for recon. pending, appeal pending sub nom. SBC Communications, Inc. v. FCC, No. 97-1118 (D.C. Cir. filed Mar. 5, 1997).

[3] Reply Comments of MCI Telecommunications Corporation at 10-11, MCI Telecommunications Corporation Petition For Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (June 24, 1997).

[4] See Motion for Summary Judgment (June 13, 1997); Opposition to Ameritech's Motion for Summary Judgment (July 9, 1997); and Opposition to Motion to Compel (August 18, 1997), filed by MCI in Ameritech Corporation v. MCI Telecommunications Corporation, File No. E-97-17, attached hereto. MCI's Opposition to Motion to Compel makes especially clear the lengths to which the Bell Operating Companies will go in their demands that the Commission psychoanalyze IXCs as to their marketing plans for the ostensible purpose of ensuring compliance with Section 271(e)(1).

Four copies of this Notice and attachments are being submitted for inclusion in the public records of both of these proceedings in accordance with Sections 1.1206(a)(1) and (a)(3), Note 2, of the Commission's Rules.

Yours truly,

Frank W. Krogh

Frank W. Krogh

cc: Christopher Heimann
Katherine Schroder
Sumita Mukhoty
Kurt Schroeder
Gary L. Phillips

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-17
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

Defendant MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby moves for summary judgment dismissing the Amended Complaint filed in this proceeding by Ameritech Corporation on the grounds that it fails to state a claim upon which relief may be granted under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., and is based on a construction of the joint marketing restriction in Section 271(e)(1) of the Communications Act, 47 U.S.C. § 271(e)(1), that is precluded by the First Amendment to the United States Constitution.

As explained in detail below, the advertisement of which Ameritech complains is clearly aimed only at large business customers and has been run only in markets where MCI provides local exchange service to such customers only via its own facilities. The advertisement therefore does not constitute the joint marketing of interLATA and resold local service and thus does not violate Section 271(e)(1) of the Communications Act, 47 U.S.C. § 271(e)(1). Moreover, since the advertisement has been run only in markets where MCI provides local service to large

business customers only via its own local facilities, the advertisement accurately represents a lawful service to those customers and thus may not constitutionally be prohibited.

Introduction

This Amended Complaint is merely the latest in a series of attempts by Ameritech and other Bell Operating Companies (BOCs) to take any steps necessary to squelch incipient competition in the heretofore monopoly local exchange market. Last year, Ameritech filed an informal complaint speculating that MCI "apparently has repeatedly violated" Section 271(e)(1) by promoting local and interLATA service together.[1] At the time, however, MCI was not providing any local service on a resale basis in Ameritech territory. Thus, its marketing could not possibly have violated Section 271(e)(1). More recently, Pacific Bell has filed a complaint with the California Public Utilities Commission challenging MCI and AT&T marketing materials as violative of Section 271(e)(1).[2]

In an effort to stem this abusive misuse of process to stifle competition, MCI recently filed a Petition for Declaratory Ruling requesting the Commission to interpret its rules

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[1] Letter from Gary R. Lytle, Ameritech, to Hon. Reed E. Hundt, Chairman, FCC, dated October 30, 1997, at 1, attached to Notice of Informal Complaint, Ameritech, IC-97-00440 (Nov. 26, 1996).

[2] Pacific Bell (U 1001 C) v. AT&T Communications of California, Inc. (U 5002 C) and MCI Telecommunications Corporation (U 5001 C), Case No. 97-03-016 (filed March 12, 1997).

implementing Section 271(e)(1) in order to settle some of the issues that the BOCs have raised with respect to interexchange carrier (IXC) joint marketing.[3] As will be explained below, this is another clear example of a baseless claim under Section 271(e)(1) that can only be intended to preserve the BOCs' local exchange monopoly. It is therefore extremely important that the Amended Complaint be dismissed quickly in order to discourage the filing of any more frivolous complaints raising nonexistent issues under the rubric of Section 271(e)(1).

The Amended Complaint

In its Amended Complaint, Ameritech focuses on an advertisement, attached as Exhibit 1 to the Amended Complaint, that MCI ran in newspapers in three cities -- Chicago, Detroit and Cleveland. The advertisement contains an illustration of a bill listing various services, including local and long distance services. Above the illustration, the ad states: "Only one bill. Only from one telecommunications company." Below the illustration appears the caption "Complete Telecommunications Bundling. Only from MCI." The ad then states, in part, that

> only MCI can offer larger businesses a bill with all of their company's communications services on it. With volume discounts based on total spending. One contract and one contact, always at your service. Even the ability to know exactly what each one of your offices is spending.

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[3] See Public Notice, Pleading Cycle Established for Comments on MCI Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Act, CC Docket No. 96-149, DA 97-1003 (released May 9, 1997).

(Emphasis added). The Amended Complaint notes that this advertisement first ran on April 7, 1997. According to the attached affidavit of Frank Nigro, it was run in its original form three more times in each of the three cities. The final run of the advertisement in each city was on April 28.

Ameritech alleges that MCI provides local exchange service on a resale basis in Chicago and Detroit and intends to provide local service on a resale basis in Cleveland, and that this advertisement therefore violates the restriction in Section 271(e)(1) against the joint marketing of interLATA and resold local exchange services by a carrier serving more than five percent of the nation's presubscribed access lines. Ameritech notes that while MCI has some local exchange facilities in those three cities, it lacks such facilities in portions of those cities and surrounding suburbs and asserts that the advertisement did not contain any warnings or disclaimers indicating that the one-stop shopping and bundled discounts it mentioned were not available to all customers of MCI's local service. Ameritech requests that the Commission hold MCI liable for violating Section 271(e)(1), order MCI to cease and desist from any further violations and require MCI to pay damages. MCI served and filed its Answer on June 2, 1997 denying Ameritech's claim and interposing the affirmative defenses of failure to state a claim and that Ameritech's claim is precluded by the First Amendment.

The Amended Complaint Fails to State a Claim

Although Ameritech carefully skirts the real issue in its Amended Complaint, it is clear that, in light of all of the relevant facts, MCI has not violated Section 271(e)(1). That provision states, in part,

> Until a Bell operating company is authorized ... to provide interLATA services in an in-region State, or until 36 months have passed since [February 8, 1996], whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.[4]

For purposes of this motion, the crucial phrase in this provision is "obtained from such company pursuant to section 251(c)(4)," the provision dealing with the purchase of BOC local exchange service for resale. As the Commission stated, in construing Section 271(e)(1) in the Non-Accounting Safeguards Order,[5] local exchange service provided via the purchase of unbundled network elements pursuant to Section 251(c)(3) of the Act or over an IXC's own facilities is not covered by the restriction in Section 271(e)(1).[6] Ameritech overlooks this

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[4] 47 U.S.C. § 271(e)(1).

[5] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996)(Non-Accounting Safeguards Order), petitions for recon. pending, appeal pending sub nom. SBC Communications, Inc. v FCC, No. 97-1118 (D.C. Cir. filed March 5, 1997).

[6] Id. at ¶ 272.

distinction when it incorrectly asserts, as a matter of law, that "MCI is prohibited from stating or implying to customers ... that it may offer them bundled packages of interLATA and local exchange services or that it can provide them both services through a single transaction."[7] It is only joint marketing of interLATA and resold local exchange services that is prohibited.

Accordingly, the challenged advertisement does not constitute prohibited joint marketing, since before, during and after the period that it was appearing in newspapers in the three cities, MCI was, and is, offering local exchange service to business customers solely via its own facilities. It did not then, and does not now, provide any local service on a resale basis to business customers in those three cities.[8] Since the ad was explicitly aimed only at "larger businesses," especially those with more than one location, it did not, and could not, constitute the joint marketing prohibited by Section 271(e)(1). The Amended Complaint therefore fails to state a claim under the Communications Act upon which any relief may be granted.

Ameritech apparently believes that because MCI provides some local services by reselling Ameritech local service to some customers in the three cities, or at least intends to do so, it is somehow prohibited from jointly advertising interLATA and facilities-based local services there solely to other customers.

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[7] Amended Complaint at ¶ 20. Ameritech makes the same misstatement of law in ¶ 21 of the Amended Complaint.

[8] Nigro Aff. at ¶ 4.

Ameritech's implicit "contamination" theory is not consistent with Section 271(e)(1) or the Non-Accounting Safeguards Order, however. As the Commission explained in that order:

> In the advertising context, the Supreme Court has held that the First Amendment protects "the dissemination of truthful and nonmisleading commercial messages about lawful products and services." We must be careful, therefore, not to construe section 271(e) as imposing an advertising restriction that is overly broad. The fact that section 271(e) permits a covered interexchange carrier to ... offer and market jointly interLATA services and local services provided through means other than BOC resold local services (e.g., ... over its own facilites ...) makes the task of crafting an effective advertising restriction particularly difficult. For example, we see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service. ... [S]uch advertisements would be truthful statements about lawful activities.[9]

Thus, since MCI provides local service to larger businesses in the three cities at issue only "through means other than reselling BOC local exchange service," there is "no lawful basis for restricting [MCI's] right to advertise a combined offering of local and long distance services." This prior Commission interpretation of Section 271(e)(1) is determinative and requires dismissal of Ameritech's Amended Complaint.

Conclusion

Ameritech's attempt to enforce a joint marketing restriction

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[9] Non-Accounting Safeguards Order at ¶ 279 (emphasis in original).

that does not exist should be rejected. In order to prevent any further stifling of competitive marketing and the inevitable chilling of protected speech resulting from multiple frivolous complaints such as this one, the Commission should immediately dismiss this Amended Complaint.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: Frank W. Krogh

Frank W. Krogh
Lisa B. Smith
1801 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-2372

Its Attorneys

Dated: June 13, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION, Complainant, v. MCI TELECOMMUNICATIONS CORPORATION, Defendant.	)	File No. E-97-17

AFFIDAVIT OF FRANK NIGRO

I, Frank Nigro, being duly sworn, depose and state as follows:

1. I am Director, Local Product Management, for Business Markets at MCI Telecommunications Corporation (MCI). In that position, I manage the marketing of MCI's facilities-based and resale-based local exchange services to business customers, and I have a detailed knowledge of MCI's provision of local exchange services in Ameritech territory and the marketing of such services.

2. This affidavit is submitted in support of MCI's motion for summary judgment dismissing the above-captioned complaint alleging a violation of Section 271(e)(1) of the Communications Act arising from the running of an advertisement in three cities in Ameritech territory.

3. The advertisement, a copy of which is attached as Exhibit 1 to the Ameritech Amended Complaint, contains an illustration of a bill listing various services, including local and long distance services. Above the illustration, the ad states: "Only one bill. Only from one telecommunications company." Below the illustration appears the caption "Complete Telecommunications Bundling. Only from MCI." The ad then states, in part, that

> only MCI can offer larger businesses a bill with all of their company's communications services on it. With volume discounts based on total spending. One contract and one contact, always at your service. Even the ability to know exactly what each one of your offices is spending.

This advertisement first ran on April 7, 1997 in newspapers in Chicago, Detroit and Cleveland and was run in its original form three more times in each of the three cities. The final run of the advertisement in each city was on April 28.

4. For almost a year before the challenged advertisement first ran, during the entire period that it was appearing in newspapers in the three cities, and to this day, MCI was, and is, offering local exchange service to business customers in Ameritech territory solely via its own facilities. It did not then, and does not now, provide any local service on a resale basis to business customers in those three cities or anywhere else in Ameritech territory. The advertisement was deliberately and explicitly aimed exclusively at "larger businesses," especially those with more than one location. The only local

services that were marketed by the advertisement were therefore local services that MCI provided using its own facilities.

I hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

Frank Nigro

Subscribed and sworn to before me this 12th day of June, 1997.

Notary Public

My commission expires 2/20/99.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-17
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

OPPOSITION TO AMERITECH'S MOTION FOR SUMMARY JUDGMENT

Introduction

Defendant MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby opposes the motion for summary judgment filed by complainant Ameritech Corporation.[1] As MCI has already explained in its own Motion for Summary Judgment, the advertisement of which Ameritech complains was clearly aimed only at large business customers and was run only in markets where MCI provides local exchange service to such customers only via its own facilities. The advertisement therefore does not constitute the joint marketing of interLATA and resold local service and thus does not violate Section 271(e)(1) of the Communications Act, 47 U.S.C. § 271(e)(1).

Moreover, since the advertisement was run only in markets where MCI provides local service to large business customers only via its own local facilities, the advertisement accurately represented a lawful service to those customers and thus may not

[1] Ameritech combined its own motion for summary judgment with its opposition to MCI's previously-filed Motion for Summary Judgment. MCI is only responding to Ameritech's request for summary judgment in this pleading.

constitutionally be prohibited. Ameritech's motion for summary judgment finding MCI liable for violating Section 271(e)(1) should therefore be denied.

As MCI has explained in its Answer, Motion for Summary Judgment and Motion to Defer Discovery, the Commission has stated, in construing Section 271(e)(1) in the Non-Accounting Safeguards Order,[2] that local exchange service provided via a covered interexchange carrier's (IXC's) own facilities is not governed by the restriction in Section 271(e)(1).[3] It is only joint marketing of interLATA and resold local exchange services that is prohibited.

Accordingly, the challenged advertisement -- which was expressly aimed at "larger businesses," especially those with more than one location -- does not constitute prohibited joint marketing, since before, during and after the period that it was appearing in newspapers in the three cities in Ameritech territory, MCI was, and is, offering local exchange service to business customers there solely via its own facilities. MCI did not, at the time the ad ran -- from April 7 through April 28, 1997 -- and does not now, provide any local service on a resale basis to business customers in those three cities (Chicago,

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[2] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996)(Non-Accounting Safeguards Order), petitions for recon. pending, appeal pending sub nom. SBC Communications, Inc. v FCC, No. 97-1118 (D.C. Cir. filed March 5, 1997).

[3] Id. at ¶ 272.

Detroit and Cleveland). Thus, the ad did not and could not constitute the joint marketing prohibited by Section 271(e)(1).

Ameritech's Motion Provides No Basis for a Finding of Liability

Ameritech's response to the undisputed facts is to try to modify them by insisting in its motion that "MCI has no [local service] facilities of its own" in the three cities where the ad ran.[4] Ameritech provides no support for this astonishing assertion, which is irrefutably rebutted by the affidavit of Frank Nigro, which is attached to MCI's Motion for Summary Judgment. As Nigro points out, not only does MCI have its own local service facilities in the three cities where the ad ran, but larger business customers in those areas also were, and are, provided MCI's local service only via those facilities.[5]

Ameritech has two fallback positions. First, it claims that the ad was not clearly aimed at larger business customers. The ad used the term "larger businesses" and referred to "each one of your offices" in type that is the same size as most of the text in the ad, however, so its target audience was certainly clear. Ameritech appears to believe that only disclaimers worded in a certain way meet the requirements of the Non-Accounting

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[4] Ameritech Motion for Summary Judgment and Opposition to MCI Motion for Summary Judgment (Ameritech Motion) at 4.

[5] Nigro Aff. at ¶ 4.

Safeguards Order,[6] but that is not what that order says. As long as a joint marketing ad is in "`a form, or include[s] such additional information ... as ... necessary to prevent its being deceptive,'" it will pass muster.[7] Here, the language in the ad made it clear that the ad was aimed only at larger businesses, to whom MCI provides local services only via its own facilities. The ad therefore did not "mislead the public by stating or implying that [MCI] may offer bundled packages of interLATA service and BOC resold service, or that [MCI] can provide `one-stop shopping' of both services through a single transaction."[8]

Ameritech's second fallback apparently is that, even assuming that the ad, as it states, was clearly aimed only at larger business customers, it still violated Section 271(e)(1) because MCI provides some local services by reselling Ameritech service to other customers, or at least intends to do so, in the three cities where the ad ran and might eventually provide resold local service to business customers there as well. Essentially, Ameritech would have the Commission hold MCI liable because MCI has not pledged that it "will not resell Ameritech [local] services to larger businesses" where the ad ran.[9] More specifically, Ameritech points to MCI's current plans to provide resold local service to business customers in Michigan in late

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[6] Ameritech Motion at 8-9.

[7] Non-Accounting Safeguards Order at ¶ 280.

[8] Id.

[9] Ameritech Motion at 6 (emphasis in original).

fall of this year.[10]

As MCI pointed out in its Motion for Summary Judgment, however, Ameritech's implicit "contamination" theory is not consistent with Section 271(e)(1) or the Non-Accounting Safeguards Order, which stated:

> The fact that section 271(e) permits a covered interexchange carrier to ... offer and market jointly interLATA services and local services provided through means other than BOC resold local services (e.g., ... over its own facilites ...) makes the task of crafting an effective advertising restriction particularly difficult. For example, we see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service. ... [S]uch advertisements would be truthful statements about lawful activities.[11]

Thus, since MCI was and is providing local service to larger businesses in the three cities at issue only "through means other than reselling BOC local exchange service," there is "no lawful basis for restricting [MCI's] right to advertise a combined offering of local and long distance services." Moreover, nowhere in the Non-Accounting Safeguards Order is there any suggestion that a covered IXC's joint marketing advertisement of lawful activities that is truthful when published may become actionable simply because at some date in the future, the IXC might start to provide local service to some of the targeted customers on a

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[10] Letter from Gary L. Phillips, Ameritech, to William F. Caton, Acting Secretary, FCC, dated June 27, 1997, at 2.

[11] Non-Accounting Safeguards Order at ¶ 279 (emphasis in original).

resale basis. Since an IXC could never be absolutely sure that it will never provide resold local service where such an ad was published, Ameritech's suggested approach would eliminate from the Non-Accounting Safeguards Order its explicit endorsement of "a covered [IXC's] right to advertise a combined offering of local and long distance services if it provides [facilities-based] local service."[12] Such a draconian expansion of the scope of Section 271(e)(1), exposing joint marketing advertisements to potential liability indefinitely, must be rejected on both statutory and constitutional grounds, since it would effectively prohibit many joint marketing advertisements of lawful activities that were truthful when published.[13]

Conclusion

Since the challenged advertisement -- jointly marketing long distance and local services only to larger business customers, who were, and are, provided MCI local services only via MCI's own facilities -- truthfully promoted lawful activities when published, it is expressly permitted by the Non-Accounting Safeguards Order and could not, in any event, be prohibited consistent with the First Amendment. Ameritech's motion for

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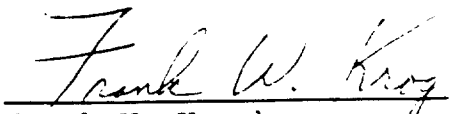
[12] Id.

[13] See id.

summary judgment holding MCI liable for violating Section 271(e)(1) of the Act must therefore be denied.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

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Its Attorneys

Dated: July 9, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-17
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

OPPOSITION TO MOTION TO COMPEL

MCI TELECOMMUNICATIONS CORPORATION

Frank W. Krogh
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Dated: August 18, 1997

TABLE OF CONTENTS

SUMMARY

MCI opposes Ameritech's Motion to Compel MCI to answer certain of Ameritech's First Set of Interrogatories on the grounds that the requested information is irrelevant to a determination as to whether the joint marketing advertisement challenged in Ameritech's Complaint violates Section 271(e)(1), such discovery would chill the exercise of First Amendment rights recognized in the Non-Accounting Safeguards Order and such disclosure would reveal commercially sensitive proprietary information.

Ameritech's rationale is based on the allegedly misleading nature of the ad in question, which cannot be resolved by discovery of subsequent events or MCI's internal marketing policies. Moreover, discovery of customer responses to the ad and MCI's marketing to such responding customers, which are the subjects of a number of the interrogatories, could only be relevant if an ad that were otherwise legal under Section 271(e)(1) could become illegal on account of subsequent customer responses and legal marketing statements by the carrier running the ad. Such a theory is inconsistent with the Non-Accounting Safeguards Order, which explicitly allows the joint marketing of local and interLATA services by an IXC providing local service via its own facilities -- as MCI does in the case of the "larger businesses" expressly targeted by the ad -- and violates the First Amendment right to make "truthful statements about lawful activities."

Furthermore, during the latter half of the ad campaign at issue, the challenged ad or a similar ad appeared with a disclaimer that MCI's offer is only available to large businesses with local service provided over MCI facilities. Ameritech has already admitted in this case that such a disclaimer "satisfies the requirements of the Act and Commission rules" and that a joint marketing ad of the type challenged here "compl[ies]" with the Act and Commission rules if it contains such a disclaimer. Since Ameritech's rationale for the discovery it seeks is the misleading nature of the challenged ad, the disclaimer published in the latter half of the ad campaign in this case is fatal to its motion to compel.

Ameritech's rationale for discovery is especially flawed as to requests related to customer responses to the ads. Since ads with clear disclaimers would also result in inquiries from potential customers that would not be eligible for the offer, such customer responses shed no light on the clarity of the ad and are thus irrelevant to the legality of the challenged ad.

Ameritech has also failed to explain how the details of MCI's local services marketing strategy and customer contacts could not be commercially sensitive matters requiring confidential treatment, especially given Ameritech's intense interest in holding on to its local service monopoly against incursions by competitors such as MCI.